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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 28th July 2011

No. 6406—I.D.-39/2010-LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 25th June 2011 in Industrial Dispute Case No. 30/2010 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of Executive Engineer, Mahanadi South Division, Jobra, Cuttack and its Workman Shri Mahendra Kumar Nanda was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

IN THE INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE NO. 30 OF 2010

Dated the 25th June 2011

Present :

Shri Raghubir Dash, O.S.J.S. (Sr. Branch),
Presiding Officer,
Industrial Tribunal,
Bhubaneswar.

Between :

The Management of the Executive Engineer, .. First Party—Management
Mahanadi South Division,
Jobra, Cuttack.

And

Shri Mahendra Kumar Nanda, .. Second Party—Workman
S/o Nrusingha Nanda,
Village Oupada, Post Dagarpada,
Via Tirtol, District Jagatsinghpur.

Appearances :

Shri Prafulla Kumar Kar, Assistant Engineer	..	For First Party—Management
Shri Mahendra Kumar Nanda	..	For Second Party—Workman

AWARD

The Government of Orissa in the Labour and Employment Department in exercise of powers conferred upon them by sub-section (5) of Section 12 read with Clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (14 of 1947) have referred the following dispute for adjudication vide their Order No. 4046—ID—39/2010-LE., dated the 17th May 2010 :—

"Whether the termination of services of Shri Mahendra Kumar Nanda, ex-D. L. R. employee with effect from the 2nd October 1995 by way of refusal of employment by the Executive Engineer, Mahanadi South Division, Jobra, Cuttack is legal and/or justified ? If not, to what relief Shri Nanda is entitled ?"

2. According to the claim statement of the second party, the first party-management had engaged the second party with effect from the 1st January 1993 to work under the Junior Engineer, Jagannathpur Section on D. L. R. basis. The office of the Junior Engineer is under the administrative control of the first party Executive Engineer. While working on D. L. R. basis continuously till the 1st October 1995 the Management suddenly terminated the services of the second party with effect from the 2nd October 1995 without notice or notice pay and retrenchment compensation. Therefore, the termination being illegal the second party should be reinstated in service with full back wages and other service benefits.

A specific plea has been taken by the second party to the effect that the then Junior Engineer had issued a work certificate in favour of the second party on the 23rd October 2000 basing on which the Assistant Engineer, Manijanga Irrigation Section had intimated to the first Party Executive Engineer that the second party had been engaged from the 1st January 1993 to the 1st October 1995 and that on the basis of the intimation of the Assistant Engineer the then Executive Engineer, Mahanadi South Division (First Party) had written to the Superintending Engineer, Irrigation Circle, Cuttack that the second party had been engaged as a D. L. R. in Jagannathpur Irrigation Section from the 1st January 1993 to the 1st October 1995.

3. In the written statement submitted by the first party it is denied that the second party was ever employed under the first party. It is pleaded that on verification of records such as Cash Book and Voucher Guard Files for the period from the 1st January 1993 to the 1st October 1995 no supporting materials showing the engagement of the second party is available in the establishment of the first party.

In reply to the specific plea of the second party that the then Executive Engineer had intimated to the Superintending Engineer certifying the engagement of the second party from the 1st January 1993 to the 1st October 1995, the first party has taken the stand that the then Junior Engineer namely, N. C. Rao and the then Assistant Engineer namely, Baina Panda had issued engagement certificates in the name of second party but after necessary enquiry it was

found that the second party could manage to get those certificates from the then Junior Engineer even though the facts stated in the certificates were not based on official documents.

4. Though the first party has filed written statement it has been set *ex parte* vide Order, dated the 24th May 2011 on the ground of non-appearance at the time of hearing.

5. Following issues have been settled :—

ISSUES

- (i) "Whether any employer and employee relationship existed between the Management and the workman ?
- (ii) Whether the termination of service of Shri Mahendra Kumar Nanda, ex-D.L.R. employee with effect from the 2nd October 1995 by way of refusal of employment by the Executive Engineer, Mahanadi South Division, Jobra, Cuttack is legal and/or justified ?
- (iii) If not, to what relief Shri Nanda is entitled ?"

6. The second party has examined himself as W. W. No. 1. he has also exhibited several documents which have been marked as Exts. 1 to 6.

FINDINGS

7. *Issues No. (i)*—Since the first party has denied that the second party was ever employed under the first party, the burden lies on the second party to prove that he had been employed to work under the Junior Engineer, Jagannathpur Section which is under the administrative control of the first party Executive Engineer. The workman relies on the work certificate issued by the Junior Engineer, the intimation of the Assistant Engineer to the Executive Engineer based on the work certificate and the letter of the Executive Engineer addressed to the Superintending Engineer stating that the second party had been engaged on D. L. R. basis from the 1st January 1993 to the 1st October 1995. These documents have been marked as Exts. 4/5, 4/2 and 4/3, respectively. It is submitted by the workman that he has obtained these documents from the office of the first party on an application made under the Right to Information Act, 2005.

In Ext. 4/5 the Junior Engineer has clearly stated that the second party had been working on daily wage basis from the 1st January 1993 to the 1st October 1995. Ext. 4/2 reflects that on the basis of Ext. 4/5 the Assistant Engineer has written to the executive Engineer that the second party had been working as a D. L. R. for the aforesaid period. Similarly, Ext. 4/3 reflects that on the report of the Assistant Engineer the Executive Engineer wrote to the Superintending Engineer that the second party was engaged as a D. L. R. from the 1st January 1993 to the 1st October 1995. The Junior Engineer issued the work certificate (Ext. 4/5) on the 23rd October 2000, about five years after the alleged disengagement. The certificate does not disclose that the Junior Engineer issued the certificate after verifying the relevant documents. Ext. 5 is another document which the second party has obtained under the

Right to Information Act, 2005. Ext. 5 is an order dated the 4th March 2010 passed by the Superintending Engineer, Eastern Circle, Cuttack which reflects that the genuineness of the work certificate (Ext. 4/5) issued by the Junior Engineer was enquired into and it was found that the certificate was not based on official documents and also not issued in any official capacity. It further reflects that in course of the enquiry the Junior Engineer, who had issued the certificate, had admitted that in order to help the second party for future engagement in any other organisation he had issued the certificate. The order further reflects that even the then Assistant Engineer had admitted in the enquiry that there was no supporting document for engagement of the second party for the aforesaid period available either in the Section Office or in the Subdivisional Office or in the Divisional Office.

In view of clear denial of the first party that the second party was ever engaged as a D. L. R. with specific plea that the certificate issued by the Section Officer was not genuine, this Tribunal must see whether the second party has proved its case by producing reliable materials. No doubt, the first party has been set *ex parte* and the documents sought to be exhibited by the second party have been marked as exhibits. In *M/s Bareilly Electricity Supply Co. Ltd. Vrs. The workmen*, reported in 1971 (II) LLJ 407 (S.C.) their Lordships have made the following observations :—

"But the application of principle of natural justice does not imply that what is not evidence can be acted upon. On the other hand, what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. It is inconceivable that the Tribunal can act on what is not evidence such as hearsay, nor can it justify the Tribunal in basing its award on copies of documents when the originals which are in custody are not produced and proved by one of the methods either by affidavit or by witnesses who have executed them, if they are alive and can be produced."

Though the second party relies on the Work Certificate marked Ext. 4/5, it is not admitted by the Management to be a genuine document. He has not taken pain to examine the person who has issued the Certificate. It is the then Junior Engineer who issued the certificate and who is competent to speak as to how and on what basis he issued such a certificate. Thus, the Certificate marked Ext. 4/5 cannot be said to have been duly proved. Consequently, no reliance can be placed either on the certificate or the letters marked Exts. 4/2 and 4/3 which have been issued on the basis of Ext. 4/5. In addition to his placing reliance on the Work Certificate, the second party could have made a prayer to this Tribunal to call for the relevant records/registers from the establishment of the first party to prove that during the periods from the 1st January 1993 to the 1st October 1995 he was engaged on daily wage basis and as against that he had also received payment of wages, more so when the first party has challenged the genuineness of the Work Certificate.

That apart the pleas taken by the first party that there was an enquiry into the genuineness of the Work Certificate, that in the enquiry it was found to be not based on official records and that the second party could manage to obtain the Certificate get support from Ext. 5 which is relied on by the second party.

For the aforesaid reasons the documents marked Exts. 4/2, 4/3 and 4/5 cannot be relied on.

8. Ext. 6 is the xerox copy of some entries made in the Cash Book dated the 25th May 1995. It is submitted that this copy was obtained under the Right of Information Act, 2005. At Sl. No. 58 of the entries it is mentioned that a sum of Rs. 500.00 was paid to Mahendra Kumar Nanda. It is submitted that this amount was paid to the second party (name of the second party is Mahendra Kumar Nanda) towards his wages. But, nothing is there in Ext. 6 which indicates that the amount was paid to the second party towards his wages. It is not understood as to why the second party, instead of obtaining all relevant entries in the Cash Book for the periods from the 1st January 1993 to the 1st October 1995, applied for the entries in the Cash Book dated the 25th May 1995 only. On the basis of Ext. 6 a finding that the second party was a Workman under the first party cannot be recorded. The other documents exhibited in this case do not reflect on the existence of employer-employee relationship between the parties. Thus, it is found that there are no reliable materials to prove that the second party was ever given employment in the establishment of the first party and there existed employer-employee relationship between the parties.

The issue is therefore, answered against the second party.

9. *Issue Nos. (ii) and (iii)*—In view of my finding on Issue No. (i), the other two issues cannot be answered. Since employer-employee relationship has not been established, it cannot be said that there was refusal of employment to the second party with effect from the 2nd October 1995.

The reference is answered accordingly.

Dictated and corrected by me.

RAGHUBIR DASH
25-6-2011
Presiding Officer
Industrial Tribunal
Bhubaneswar.

RAGHUBIR DASH
25-6-2011
Presiding Officer
Industrial Tribunal
Bhubaneswar.

By order of the Governor

T. K. PANDA

Under-Secretary to Government